IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8809 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and

MR.JUSTICE R.K.ABICHANDANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? yes

2. To be referred to the Reporter or not? yes

3. Whether Their Lordships wish to see the fair copy of the judgement? no

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? no

5. Whether it is to be circulated to the Civil Judge? no

LAXMI CEMENT DISTRIBUTORS PVT LTD

Versus

SALES TAX OFFICER (2)

Appearance:

MR KH KAJI for Petitioner

LD. COUNSEL MR. MG DOSHIT & LD. GOVT. COUNSEL MR. PRASHANT DESAI FOR RESPONDENTS.

CORAM : MR.JUSTICE S.D.DAVE and

MR.JUSTICE R.K.ABICHANDANI

Date of decision: 04/12/97

ORAL JUDGEMENT

Per: S.D. Dave, J : -

This Petition arising under Article 226 of the Constitution ultimately takes us to the Tax Law under the Gujarat Sales Tax, 1969, and under the Central Sales Tax Act. 1956, and the relevant provisions as they stood on earlier occasions. The question to be decided by us is, as to whether the Sales Tax Authorities were justified in imposing the penalty against the petitioner and also in asking for the interest.

The petitioner challenges the validity of the demand of Rs.4,97,196-00 under the Gujarat Sales Tax Act, 1969 (hereinafter referred to as the "Gujarat Act") and Rs.1,21,024-00 under the Central Sales Tax Act, 1956 (hereinafter referred to as the "Central Act") by way of penalty under section 45 (5) and interest under section 47 (4A) of the Gujarat Act.

It is averred that, the petitioner who happens to be a Private Limited Company was carrying on business as Distributors of Cement. The sales by the petitioner Company were through the Director General Of Supplies & Disposal to various Government and Public Sector Corporations and Companies. The above said sales were to be effected as per the provisions of the Cement Control Order, and also under the agreement between the petitioner and the Director General Of Supplies & Disposal (DGS & D). The purchasers under the agreement were to pay the sales tax on the cement supplied. The question therefore that had arisen in this connection is, as to whether the freight for the transport of the cement would form a component of the sale price of the cement, and consequently therefore, whether it would be includable in the turn over of taxable sales for levying sales tax under the Gujarat and Central Acts. It is clear that, in view of the judgment of the Apex Court in case of Hyderabad Asbestos Cement Products Ltd. Vs. State of Andhra Pradesh, 24 STC, 487, freight did not form part of the price, and therefore sales tax was not payable on the freight element. According to the petitioner Company, relying upon the said decision the DGS & D had not paid sales tax to the petitioner on the freight element of the sale price of the cement. But according to the petitioner, later on, by way of subsequent development arising out of Supreme Court pronouncement in case of Hindustan Sugar Mills Ltd. v. State of Rajasthan, 43 STC, 13, the Supreme Court has said that, looking to the scheme of the Cement Control Order under scrutiny of the Supreme Court, the freight was payable by the seller and that, he had recovered the same from the purchaser and that, in view of the fact and circumstances of the case, sales tax was payable also on

the freight element of the sale price.Thus, according to the petitioner Company, an entirely different view came to be taken as a subsequent development arising from a subsequent case law pronounced by the Supreme Court. The case of the petitioner therefore is that, during this period necessarily they have not paid the sales tax on the freight element of the purchase price. According to the petitioner Company, therefore, there was a reasonable cause for them not to pay the sales tax on the freight element of the purchase price, and therefore, in such circumstances, according to them, the penalty could not have been levied. This is so far as the penalty aspect of the matter is concerned.

So far as the interest aspect of the matter is concerned, the say of the petitioner is that, at the relevant time under the statute which was in force, there was no provision for interest whatsoever and that, for the first time with effect from 1st. April 1976 the interest provision came on the Statute Book, and therefore, interest as claimed by the Department could not have been claimed and/or demanded.

At this juncture a reference requires to be made to the communication under which the petitioner Company has been called upon to make payment, both in respect of the penalty and the interest. The Schedule annexed to the said communication would go to show that, the Sales Tax Authorities are demanding interest and penalty both for the period commencing from 1-1-1970 and ending in year 1975. According to us, these dates and the years have an important bearing on the matter, when we shall have to examine the question as to whether the interest could have been demanded by the Respondent Sales Tax Authorities. At this juncture we only notice that the demand is in respect of the above said time limit, namely 1-1-1970 to year 1975.

The first question which arises for our consideration therefore is, as to whether the Respondent authorities were justified in levying penalty on the petitioner Company on the ground that,they have failed to pay the demand in respect of outstanding of the sales tax dues. As indicated by us earlier, the case of the petitioner Company is that, under the earlier Supreme Court pronouncement, namely 24 STC, 487 (supra) they were not required to take into consideration the freight element while deciding and showing the price of the cement sold, and thereafter the amount of the sales tax to be paid. But according to them, the entire position had taken a somersault because of the pronouncement of

the Supreme Court in case of Hindustan Sugar Mills Ltd. (supra).

When a reference is made to the above said two pronouncements of Supreme Court, it is apparently clear that the petitioner Company is perfectly justified in saying that, under the previous decision of the Supreme Court the freight element was not required to be taken into consideration while deciding the turn over by way of sales. This position came to be changed because of a later view of the Supreme Court in case of Hindustan Sugar Mills Ltd. (Supra) This decision which is later in time came to be pronounced by Supreme Court on August 22, 1978. Therefore we shall have to accept the factual situation as urged by the petitioner that, during the period between these two decisions, the petitioner Company had a belief that, in fact the freight element did not form part of the price and therefore the sales tax was not payable on the freight element.

The question is as to whether this changed situation taking place because of changed view of the Apex Court would be of significant importance, when the petitioner Company urges before us that, it cannot be said that they had not paid the dues without a reasonable belief. Before we proceed further to examine this aspect of the matter, the reference requires to be made to the provisions contained both under the earlier Act and the present Act which is in force. It appears that the provisions for the purpose of levying of penalty under the old Act and under the new Act are of pari materia, at least for the aspect to " the failure to comply with the notice without reasonable cause. "

The relevant provision under the Gujarat Sales Tax Act, 1969, which were in force at the relevant time run thus:-

" 45 (2) If, while assessing the amount of tax due from a dealer under section 41, it appears to the Commissioner that such dealer -

(a) has failed to apply for registration as required by section 29, or

(b) has without reasonable cause, failed to comply with the notice under section 41, or

(c) has concealed the particulars of any transaction or deliberately furnished inaccurate particulars of any transaction liable to tax,

the Commissioner may impose upon the dealer by way of penalty; in addition to any tax assessed under section 41, a sum not exceeding one and one-half times the amount of the tax."

The provisions under consideration would go to show that the penalty could be levied if a dealer does not without reasonable cause pay the tax within the time he is required to pay under the provisions of the Act. The emphasis should be upon the phraseology underlined by us, namely without reasonable cause . The question therefore which precisely falls for our consideration is, as to whether the petitioner Company could be said to be guilty of not paying the sales tax within the prescribed time limit without a reasonable cause. In our opinion, the non payment or the delay in payment in fact has been occasioned because of the changed view of the Supreme Court. Under the earlier decision, as pointed out by us, the freight element was not to be taken in to consideration as part of the price and therefore the sales tax was not made payable on the freight element. Later on, under the changed view of the Supreme Court, this element, namely the freight element has been accepted as a component or the part of the price. The assessee in our opinion would be having a belief based upon the earlier Supreme Court decision that the freight element is not to be taken into consideration while deciding the price and therefore, the turn over. The question may arise as to how would you define a reasonable cause ?. The answer shall have to be provided on the basis of the ordinary meaning which could be given to a " reasonable cause ". A cause could be said to be a 'reasonable cause' when the same is able to appeal to the reason or a conscience. It might be a conscience of a dealer or a conscience of the taxing authority or the Court ultimately. The petitioner Company had every reason to believe that, because of the Supreme Court pronouncement the freight element was not to be taken in to consideration as part of the price. It is a matter of common knowledge that, such decision of the Apex Court percolate rapidly to the bottom level. The dealer might be a small shop keeper or a corporate giant, would know as to what has been said by Supreme Court in respect of their tax liabilities. This generally percolate through the practitioners or the counsels under whose guidance the dealers are acting while filing the returns and making up their mind regarding the sales tax labilities. This must all have happened in this case also, because ultimately, under the earlier Supreme Court decision the

tax liability on the part of the dealer was being scaled down to a significant extent. Later on when the situation had taken a change in view of the Supreme Court pronouncement in Hindustan Sugar Mills Limited (supra), the dealers in the country could be aware that the benefit which they were deriving under the earlier Supreme Court decision was no more available to them. But during this period if the dealers in general and the dealer in particular before us had not taken into consideration the freight aspect of the matter as the part of the price, in our opinion, they cannot be said to be not paying the tax without a reasonable cause. In our opinion, therefore, there has been no scope under the Act for levying and demanding the penalty for this period. The demand therefore in respect of this period for the penalty as shown in the annexure to the communication Exhibit-A shall have to be struck down.

The next question would be in respect of the interest. We have made it clear earlier that, the interest is being demanded from 1-1-1970 to year 1975. The contention, in this behalf, coming from Ld. counsel Mr. Kaji for the petitioner is that, at the relevant time, namely the time-lag covering the above said period there was absolutely no provision for interest and that, the interest element came on the Statute Book only at a later juncture when provisions contained under sub-section (4A) to section 47 came to be inserted by Act No. 10 of 1976 vide Section 8 thereof. Upon a reference to the above said amending Act, it is apparent that the Act came to be amended and section (4A) making the provision for the interest came to be inserted in the Act by this Act No. 10 of 1976 with effect from 1-4-1976. In other words, under the provisions under which the case of the petitioner was required to be considered for the above said period, namely between 1-1-1970 and year 1975 there was absolutely no provision regarding the interest. If this were to be the position, in our opinion, for the above said years, the interest could not have been imposed and demanded.

There was an endeavour on the part of Ld. counsel Mr. Prashant Desai appearing on behalf of the Revenue for contending that, when the Statute stands amended and there has been specific provisions duly inserted under the amendment for levying and recovering of the interest, the petitioner is not justified in making a grievance in this respect before us. We must admit that, we are not in a position to entertain even for a while the above said contention coming from Ld. counsel Mr. Desai for the Revenue. It should not be

over looked that at the relevant time there was absolutely no provision for the levy, collection and/or demand of the interest on the delayed payments. This aspect of the interest has been inserted in the Statute Book only with effect from 1-4-1976. Any provision in the Tax Statute which comes on the Statute Book by inserting amendment cannot be accepted as having a retrospective or a retro-active character under which something which was never demandable and payable could be demanded or paid, unless provided expressly or by necessary implication.

With a view to buttress the contention that the charging sections under Tax Statute creating a further or a greater liability on the assessee could not be presumed to have retrospective effect, Ld. counsel Mr. Kaji places reliance upon the Supreme Court pronouncement in J.K. Synthetics Ltd. V. Commercial Taxes Officer, 94 STC, pg. 422. This decision points out the distinction between that part of the Statute which is amended for charging or levying tax or interest on delayed payments and the machinery provisions sought to be inserted in the Statute, with a view to collect the dues of the tax as levied under the charging provisions. The Supreme Court makes it clear that, ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other Statute. After saying so the Supreme Court proceeds to say that the charging provisions are substantive law in nature. The question stands concluded by the Supreme Court by saying that:-

".. But regardless of the reason which impelled the Legislature to provide for charging interest, the court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati, J, in the Associated Cement Company's case (1981) 48 STC 466 (SC) that if the Revenue's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the Legislature. "

Therefore, the contention coming from ld.

counsel for Revenue Mr. Desai can not be accepted, that, the amended provisions which came on the statute book with effect from 1-4-1976 could be utilised for the purpose of levying and collecting interest for the years during which there was absolutely no provision for the interest.

Moreover during the scrutiny of the amended provisions, learned counsel Mr. Desai was not in a position to point out that, they are retrospective or retro-active in operation either in express terms or by necessary implications. In view of all these, the contention coming from learned counsel Mr. Kaji shall have to be accepted that it was not open for the revenue to ask for the interest for the aforementioned period.

Ld. counsel Mr. Kaji wanted to go a step beyond and urge that, even after 1-4-1976 the interest on the outstanding could not be demanded and collected. In our opinion, this question does not fall for our consideration simply because the demand in question is limited up to the year 1975. Because of this, in our view the question which is not relevant for the purpose of decision of the present petition, does not require our attention and decision. We do not express any opinion on this advanced part of argument coming from learned counsel Mr. Kaji for the Assessee.

In the result thereof, the present petition succeeds and the same requires to be allowed. While allowing the petition, we quash and set aside the communication cum order Annexure-A dated 1st. October 1992 along with the schedule showing the particulars regarding the demand of the interest and penalty . Rule is made absolute to the above said extent, with no order as to costs.

At this juncture ld. counsel Mr. Kaji places before us a communication dated 3rd. December 1997 under the signature of the Chief Accountant of the Assessee addressed to him, saying that, certain amounts totalling Rs.3,79,051-00 have been paid under the interim orders of this Court. These amounts are towards the interest claimed by the Respondents. If these amounts are already paid, the same shall be returned to the Assessee within six weeks hereof. The communication being presented by ld. counsel Mr. Kaji be retained on record.

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